No. 87-780

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALAN D. POLLAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to be released pending appeal under 18 U.S.C. (Supp. IV) 3143(b)(2) on the ground that his appeal "raises a substantial question of law or fact likely to result in reversal [or] an order for a new trial."

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The order of the court of appeals was entered on September 21, 1987. The petition for a writ of certiorari was filed on November 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to distribute cocaine (21 U.S.C. 846), on one count of attempting to distribute cocaine (21 U.S.C. 846), and on two counts of facilitating the possession and distribution of cocaine (21 U.S.C. 843(b)). He was sentenced to six years' imprisonment on

the conspiracy and attempt counts, to be followed by five years' probation on the facilitation counts. Pet. App. 28a-29a. He was also ordered to pay a $5,000 fine.

The evidence at trial[1] showed that two Chicago drug dealers, Charles Petersen and Gary Raffanti, were convicted in February 1986 of offenses relating to the distribution of 225 kilograms of cocaine in Chicago over a five-year period. After the convictions, they began cooperating with the government by providing names of their major customers and by acting in an undercover capacity. Petitioner was named as a major customer who purchased one kilogram of cocaine per month from 1980 or 1981 through late 1985. In April 1986, Petersen, acting in an undercover capacity, arranged for petitioner to purchase one kilogram of cocaine for $37,000. Petitioner was arrested after his agent delivered the $37,000.

After his arrest, petitioner cooperated with the government and engaged in plea negotiations. During the negotiations, petitioner gave the government information regarding his role in the drug trafficking conspiracy. The government offered to permit petitioner to plead guilty in exchange for a government recommendation that he not be imprisoned for more than ten years. See Gov't Opp. to Def. Emer. Mot. for Release on Bond Pending Appeal 2. Petitioner did not accept the offer, but instead obtained new counsel and proceeded to trial.

Petitioner was tried with seven co-defendants. The evidence against petitioner at trial consisted entirely of tape-recorded conversations between petitioner and Petersen and testimony from Petersen and Raffanti. Following his conviction, petitioner filed an emergency motion for bail pending appeal. The district court denied the motion.

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[1] The transcript of the five-week trial is not yet available. The facts related above, however, are not in dispute.

Petitioner then filed a motion with the court of appeals for release pending appeal. After stating that the standard for such release was whether the appeal presented "a 'close' question . . one that could be decided either way . . that is . . it is a toss-up or nearly so" (Emer. Mot. 3), petitioner argued that two of the issues he intended to present on appeal were "close" questions. See Emer. Mot. 3 n. 3. First, he contended that the district court erred in failing to conduct an evidentiary hearing on the question whether the government breached an unwritten plea agreement.[2] Second, petitioner contended that the government "may" have used information against him at trial that he provided under an implied grant of immunity. See Emer. Mot. 7.

On September 21, 1987, the court of appeals denied petitioner's emergency motion for release pending appeal. The court held that petitioner "has failed to demonstrate by clear and convincing evidence that this appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial." Pet. App. 2a. On October 7, 1987, Justice Stevens denied petitioner's application for release pending appeal (Pet. App. 3a).

ARGUMENT

Petitioner contends (Pet. 6-10) that a convicted defendant who is found not to pose a risk of flight or danger to

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[2] Petitioner first raised this question in the district court in a motion to compel specific performance of a plea agreement (Pet. App. 14a-27a). Papers attached to the motion indicate that in petitioner's first meeting with the prosecutor, petitioner was told that he could receive ten years' imprisonment if he failed to cooperate, that petitioner met with the prosecutor for "debriefing" on two subsequent occasions, that on two occasions the prosecutor told him he would see what he could do if petitioner cooperated and that ultimately the prosecutor told defense counsel that the government would not authorize a sentence recommendation of less than 10 years' imprisonment. *Ibid.*

the community must be released pending appeal if his issues on appeal are not frivolous. He argues that this Court should adopt the historical "frivolousness" test that was applied to bail determinations before enactment of the Bail Reform Act of 1984, 18 U.S.C. (Supp. IV) 3141 *et seq.* (Pet. 8-10). Petitioner did not make this argument in the court of appeals. In any event, the argument overlooks the effect of the Bail Reform Act, which was to repeal the "frivolousness" test and replace it with a more exacting standard.

Before the Bail Reform Act became effective on October 12, 1984, a defendant had to be released on bail pending appeal unless the court found that his release would present a risk of flight or danger to the community or unless the appeal was "frivolous or taken for delay" (18 U.S.C. 3148).

The Bail Reform Act of 1984, however, provided that a court may release a convicted defendant pending appeal only if it finds "that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal [or] an order for a new trial." 18 U.S.C. (Supp. IV) 3143(b)(2). As the Senate Committee on the Judiciary explained, the purpose of the new statute was to eliminate the presumption that a convicted defendant should be released pending appeal. See S. Rep. 98-225, 98th Cong., 1st Sess. 26 (1983). The Committee stated (*ibid.*):

> Once guilt of a crime has been established in a court of law, there is no reason to favor release pending * * * appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.

The Committee further noted that, in order to "give[] recognition to the basic principle that a conviction is presumed to be correct," a convicted defendant may be released pending appeal only after "an affirmative finding

[by the court] that the chance for reversal is substantial" (*id.* at 27).

Because the Bail Reform Act expressly changed the law, prior judicial statements concerning whether an appeal was frivolous are no longer relevant to the availability of bail pending appeal. Under the Bail Reform Act, a convicted defendant may be released pending appeal only if the appeal "raises a substantial question of law or fact." 18 U.S.C. (Supp. IV) 3143(b)(2). See *United States* v. *Miller*, 753 F.2d 19, 23 (3d Cir. 1985) ("a defendant seeking bail on appeal must now show that his or her appeal has more merit than under the discarded 'frivolous' test"); see also *United States* v. *Giancola*, 754 F.2d 898 (11th Cir. 1985) (agreeing with the Third Circuit that the Bail Reform Act repealed the "frivolousness" test), cert. denied, No. 86-491 (Dec. 15, 1986).

Contrary to petitioner's suggestion (Pet. i), the "substantial question" test in the Bail Reform Act is not so vague as to be unintelligible. The leading case defining the meaning of "substantial question" is *United States* v. *Giancola, supra.* In that case, the Eleventh Circuit held that a "substantial question" is "a 'close' question or one that very well could be decided the other way." 754 F.2d at 901. The First, Second, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have followed the Eleventh Circuit's articulation of the "substantial question" test. See *United States* v. *Shoffner*, 791 F.2d 586 (7th Cir. 1986); *United States* v. *Pollard*, 778 F.2d 1177 (6th Cir. 1985); *United States* v. *Bayko*, 774 F.2d 516 (1st Cir. 1985); *United States* v. *Affleck*, 765 F.2d 944 (10th Cir. 1985); *United States* v. *Powell*, 761 F.2d 1227 (8th Cir. 1985), cert. denied, 476 U.S. 1104 (1986); *United States* v. *Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985); *United States* v. *Randell*, 761 F.2d 122 (2d Cir. 1985).

In *United States* v. *Handy*, 761 F.2d 1279 (1985), the Ninth Circuit agreed with the uniform decisions of the other circuits that the "substantial question" test requires

more than the discarded "frivolousness" test. The Ninth Circuit, however, chose to characterize a "substantial question" as one that is "fairly debatable" (*id.* at 1283) (citation omitted). And in *United States* v. *Smith,* 793 F.2d 85 (1986), cert. denied, No. 86-693 (Jan. 12, 1987), the Third Circuit adopted the "fairly debatable" formulation used in *Handy* rather than the "close question" formulation used in *Giancola. Id.* at 89.

It is unclear whether the slight difference in the two formulations of the "substantial question" test has any practical effect. For example, in *United States* v. *Messerlian,* 793 F.2d 94 (1986), the Third Circuit ordered a defendant's release only after noting that his legal issues were substantial under both the "close question" and "fairly debatable" formulations. For that reason, we believe that there is no need for this Court to attempt further to refine the meaning of the term "substantial question" under that Bail Reform Act. Under either formulation, it is clear that bail may not be granted pending appeal unless the defendant satisfies his burden of showing that his appeal raises a difficult legal or factual question that presents a significant chance of reversal of his conviction. As the Seventh Circuit aptly noted, further efforts at defining the standard "might give the impression that this determination is susceptible of mathematical precision." *United States* v. *Shoffner,* 791 F.2d 586, 588-590 (1986).[3]

In any event, the issues that petitioner raises do not satisfy either the "fairly debatable" standard of *Handy* or the "close question" standard in *Giancola.* Petitioner's arguments before the Seventh Circuit apparently will be

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[3] Petitioner's apparent suggestion (Pet. 10 n.8) that the Eighth Amendment bars detention pending appeal has no merit. See *United States* v. *Williams,* 822 F.2d 512, 517 (5th Cir. 1987); *United States* v. *Powell,* 761 F.2d at 1234. This Court has never hinted that a person convicted of a federal crime and sentenced to prison has a constitutional right to be released pending appeal.

based on his pretrial dealings with government attorneys. Petitioner contends that he is entitled to an evidentiary hearing to determine whether the government breached an unwritten plea agreement or used evidence that was obtained from petitioner under a grant of immunity. Nothing in the record, however, supports petitioner's contentions.

According to petitioner's in camera submission (Pet. App. 25a-27a), which presumably relates the facts in the light most favorable to petitioner, an Assistant United States Attorney stated that he would "see what can be done in light of [petitioner's] cooperation and candor" (Pet. App. 25a). Petitioner concedes that at that time the government attorney told him "I cannot promise anything to you" (*ibid.*). The government ultimately offered to recommend a ten-year sentence in exchange for petitioner's guilty plea. Petitioner rejected that offer and proceeded to trial. Thus, even under petitioner's own version of the facts, it is clear that the parties never reached a plea agreement.

Nor does petitioner point to anything in the record indicating that the government used evidence at trial that was obtained from petitioner under a grant of immunity. Petitioner cites nothing showing that he was ever granted immunity. Moreover, the evidence at trial consisted entirely of tape-recorded conversations between petitioner and Petersen and the testimony of Petersen and Raffanti. The tape-recorded evidence obviously predated petitioner's discussions with the government, as did the availability of Petersen and Raffanti as witnesses. Petitioner has not suggested how he would show that the government impermissibly used evidence obtained under a grant of immunity or during the plea bargaining process against him at trial. Hence, it is plain that petitioner's legal arguments on appeal meet no announced test of substantiality.[4]

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[4] Petitioner's further contention (Pet. 17-19) that the government's conduct denied him his Sixth Amendment right to counsel is wholly

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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without merit. The premise for that claim—that the government engaged in misconduct—is faulty for the reasons discussed above. Moreover, petitioner's decision to dismiss his counsel because he was disappointed that the government did not offer a favorable plea bargain as counsel had predicted does not constitute a denial of effective assistance of counsel.

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